

FEE EXEMPT

1 SCOTT S. SLATER (State Bar No. 117317)
BRADLEY J. HERREMA (State Bar No. 228976)
2 **BROWNSTEIN HYATT FARBER SCHRECK, LLP**
1020 State Street
3 Santa Barbara, CA 93101-2711
Telephone: 805.963.7000
4 Facsimile: 805.965.4333

5 Attorneys for:
CHINO BASIN WATERMASTER

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 FOR THE COUNTY OF SAN BERNARDINO

11 CHINO BASIN MUNICIPAL WATER
DISTRICT,

12 Plaintiff,

13 v.

14 CITY OF CHINO, et. al.,

15 Defendants.

Case No. RCV RS51010

[Assigned for All Purposes to the
Honorable Stanford E. Reichert]

**CHINO BASIN WATERMASTER
RESPONSE TO FEBRUARY 22, 2017
ORDER**

DATE: April 28, 2017
TIME: 1:30 P.M.
DEPT.: S35

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20 The Chino Basin Watermaster (“Watermaster”) has two primary duties arising under the
21 Judgment: (1) the administration of the decree and (2) the development and implementation of the
22 Optimum Basin Management Program (OBMP). (Restated Judgment at ¶ 41.) In fulfillment of
23 its obligation to re-determine Safe Yield as provided in the previously approved OBMP
24 Implementation Plan (OBMP Implementation Plan at p. 44), Watermaster sought to reset Safe
25 Yield concurrently with a *proposed* resolution of material issues identified by parties as
26 inextricably intertwined with the reset. The 2015 Safe Yield Reset Agreement (“Agreement”)
27 was an instrument acceptable to parties representing more than 85 percent of the production rights
28

1 within the Basin, approved by each of the three Pools and the Advisory Committee, and
2 forwarded to the Court for its consideration along with Watermaster's recommendation for
3 approval.

4 In response to Watermaster's request, by its February 22, 2017 Revised Proposed Order
5 Re SYRA and Response to Questions; Issue for Further Briefing ("Order"), the Court has reset
6 Safe Yield at 135,000 AFY pursuant to the methodology set forth in the Order, made specific
7 rulings of law, and declined to approve the balance of the Agreement for reasons set forth therein.
8 (Order at p. 3.) Watermaster has read the Order and the Revised Proposed Order in their
9 entireties and has a good faith belief there is sufficient clarity to implement its provisions as
10 directed by the Court with one exception: the issue the Court reserved for further briefing that is
11 addressed immediately below. (Order at p. 5.)

12 **A. Safe Yield and Desalter-Induced Recharge**

13 The Order (Order at p. 5) identifies the following issue originally identified by the
14 Overlying (Agricultural) Pool as the sole subject for further briefing:

15 Please clarify whether your tentative (Proposed Order) considers
16 the 135,000 AFY of Safe Yield reset as inclusive of the Desalter-
17 Induced Recharge of 20,000 AFY. In other words, does the Safe
18 Yield include the 20,000 AFY induced as a result of the pumping of
19 the Desalters? The assumption being that the full Desalter
20 production is 40,000 AFY with close to 50% being induced into the
21 Basin. (Overlying (Agricultural) Pool's Questions for Clarification
22 Regarding Proposed Orders for Watermaster's Motion Regarding
23 2015 Safe Yield Reset Agreement, Amendment of Restated
24 Judgment, Paragraph 6 at p. 2.)

25 Does the determined Safe Yield of 135,000 AFY include Desalter-Induced Recharge?

26 The answer is "yes" subject to the contractual dedications provided in Peace Agreement
27 paragraph 7.5 and Peace II Agreement paragraph 7.1.¹ As explained below, this means that,
28 although Desalter-Induced Recharge is physically an input in Safe Yield, by contract this

¹ The Peace Agreement and Peace II Agreement were attached as Exhibits F and H, respectively, to Jurupa Community Services District's Request for Judicial Notice In Support of Opposition to Watermaster's Motion Regarding 2015 Safe Yield Reset Agreement, Amendment of Restated Judgment, Paragraph 6 filed on January 19, 2016 ("JCSD RJN").

1 component of net recharge is not available for production for any purpose other than to offset
2 Desalter Production.

3 Safe Yield is defined by the Restated Judgment as “The long term average annual quantity
4 of ground water (excluding replenishment or stored water but including return flows from
5 replenishment or stored water) which can be produced from the basin under the cultural
6 conditions of a particular year without causing an undesirable result.” (Restated Judgment at ¶
7 4(x).) This definition, as well as the technical report relied upon by the Court in setting the Safe
8 Yield at 135,000 AFY, includes all sources of recharge (inputs), whatever they may be,
9 including Desalter-Induced Recharge from the Santa Ana River. (See Declaration from Mr.
10 Wildermuth (“Wildermuth Decl.”) filed concurrently herewith.)

11 The Court has also correctly ruled with ample citation that, by contract, the Desalter-
12 Induced Recharge is New Yield and unavailable to specific parties for production as the
13 measured quantity of this water has been, in its entirety, dedicated to offset Desalter Production.
14 (Order at p. 2; see Peace II Agreement at ¶ 7.1 (JCSD RJN at Ex. H).) In effect, the Peace II
15 Agreement does not alter the *physical reality* that Desalter-Induced Recharge contributes water
16 to the Basin and falls within the definition of Safe Yield. Nor did the Peace II Agreement amend
17 the Judgment’s legal definition of Safe Yield. Rather, the Peace II Agreement simply requires
18 that this specific component of supply be reserved exclusively to offset Desalter Production so
19 that it is not distributed to the parties for production under their respective rights to Safe Yield.
20 The critical language frequently cited by the Court provides in relevant part:

21 For the initial term of the Peace Agreement, neither Watermaster
22 nor the Parties will request that Safe Yield be recalculated in a
23 manner that incorporates New Yield *attributable to the Desalters*
24 into the determination of Safe Yield so that this source of supply
will be available for Desalter Production rather than for use by
individual parties to the Judgment. (Peace II Agreement at ¶ 6.1
(emphasis in original) (JCSD RJN at Ex. H).)

25 Consequently, Watermaster must recalculate Safe Yield in a manner that preserves this
26 source as an offset to Desalter Production and not for use by individual parties. (Peace
27 Agreement at ¶ 7.5; Peace II Agreement at ¶ 7.1 (JCSD RJN at Exs. F and G).) This is precisely
28

1 what Watermaster proposes to do² without intent to circumvent this limitation or causing harm to
2 any party.

3 Although the Desalter-Induced Recharge is an inflow to the Basin and therefore a physical
4 component of Safe Yield, it is contractually sequestered by paragraph 7.1 of the Peace II
5 Agreement for the sole purpose of offsetting Desalter Production. (See Watermaster’s
6 Compliance With Condition Subsequent Number Seven; Supplement to Condition Subsequent
7 Number Five at Ex. A, Tables 1, 2 and 3;³ Safe Yield Reset Implementation, Desalter
8 Replenishment Accounting Illustration, Column G (Motion at Attachment 1).) Thus,
9 Watermaster proposed and the technical memorandum approved by the Court resets the Safe
10 Yield to 135,000 AFY inclusive of Desalter-Induced Recharge. (Wildermuth Decl. at ¶¶ 3-6;
11 Watermaster’s Response to Questions for Clarification in Final Orders for Watermaster’s Motion
12 Regarding 2015 Safe Yield Reset Agreement, Amendment of Restated Judgment Paragraph 6
13 filed on October 28, 2016, at Exhibit “A” Columns 1 and 2.)

14 However, the quantity of Desalter-Induced Recharge is also contractually sequestered and
15 will not be distributed to the parties as their annual share of Safe Yield, as it is reserved as an
16 offset to Desalter Production. (Peace II Agreement at ¶ 7.1 (JCSD RJN at Ex. H); see
17 Watermaster’s Compliance With Condition Subsequent Number Seven; Supplement to
18 Condition Subsequent Number Five at Ex. A, Tables 1, 2 and 3 (April 1 Brief at Ex. 7); Safe
19 Yield Reset Implementation, Desalter Replenishment Accounting Illustration, Column G
20 (Motion at Attachment 1).)

24 ²Safe Yield Reset Implementation, Desalter Replenishment Accounting Illustration, Column G
25 (The accounting illustration was included as Attachment 1 to the Motion Regarding 2015 Safe
26 Yield Reset Agreement, Amendment of Restated Judgment, Paragraph 6, which was filed on
27 October 23, 2015 (“Motion”); subject to Court’s denial of Watermaster request to adjust
28 controlled overdraft schedule.

³ Watermaster’s Compliance With Condition Subsequent Number Seven; Supplement to
Condition Subsequent Number Five at Ex. A, Tables 1, 2 and 3 was attached as Exhibit 7 to
Watermaster’s Response to Order for Additional Briefing, which was filed on April 1, 2016
 (“April 1 Brief”).)

1	For illustration:	
2	Safe Yield:	135,000 AFY
3	Desalter Induced Recharge	-20,000 AFY (for illustration ⁴)
4	Ag Pool	-82,800 AFY ⁵
5	Non Ag Pool	<u>- 7,366 AFY</u>
6	Appropriative Pool	=24,834 AFY ⁶

7 In any year that the cumulative production by the parties exceeds 135,000 AFY minus the
 8 Desalter-Induced Recharge, which is exclusively reserved to offset Desalter Production (Peace II
 9 Agreement at ¶ 7.1(JCSD RJN at Ex. H)), each party⁷ or Pool⁸ that pumps in excess of its
 10 respective established right in a production year incurs a replenishment obligation.

11 Likewise, in each year, Desalter Production will be offset as described by the hierarchy set
 12 forth in the Peace Agreement (¶ 7.5(JCSD RJN at Ex. F)) and as addressed in the following
 13 illustration:

14	Desalter Production	- 40,000 AF
15	Desalter Induced Recharge	+ 20,000 AF ⁹
16	Basin Re-Operation	<u>+ 10,000 AF¹⁰</u>
17	Appropriator Replenishment	= + 10,000 AF

18 Because, in the example, the sum of available offsets is less than the amount of Desalter
 19 Production, a replenishment obligation will be incurred by all members of the Appropriative
 20

21 ⁴ This illustrative quantity will be replaced by an annual determination. (Peace II Agreement at ¶
 22 7.1 (JCSD RJN at Ex. H).)
 23 ⁵ Any unproduced Agricultural Pool water will be apportioned to members of the Appropriative
 24 Pool to supplement the decline in Safe Yield, to satisfy Land Use Conversion Claims, and to
 25 satisfy Early Transfer claims, consistent with paragraph 10 of Exhibit “H” to the Restated
 26 Judgment, and the Court’s Proposed Order.
 27 ⁶ This is the quantity of Safe Yield that will be available to members of the Appropriative Pool.
 28 (Restated Judgment at ¶ 44.)
⁷ Appropriative and Overlying (Non-Agricultural) Pools. (Restated Judgment at ¶ 45.)
⁸ Overlying (Agricultural) Pool. (*Id.*)
⁹ Actual contribution will be annually determined. (Peace II Agreement at ¶ 7.1(JCSD RJN at Ex.
 G).)
¹⁰ Actual amount varies annually pursuant to the Court approved schedule. (See Watermaster’s
 Compliance With Condition Subsequent Number Seven; Supplement to Condition Subsequent
 Number Five (April 1 Brief at Ex. 7).)

1 Pool to balance input and output. (Peace Agreement at ¶ 7.5(d); Peace II Agreement at ¶ 6.2(b)
2 (JCSD RJN at Exs. F and H).)

3 This integrated treatment of Safe Yield and Desalter-Induced Recharge as New Yield
4 preserves the concept of “bucket for bucket” replenishment for production in excess of Safe
5 Yield, respects the prior agreement among the parties (Peace II Agreement at ¶ 7.1(JCSD RJN at
6 Ex. H)) and will avoid an unauthorized decline in groundwater levels preserving the physical
7 integrity of the Basin.

8 If this were not the proper interpretation, then either: (a) the Safe Yield must be
9 quantitatively reduced by the amount of Desalter Induced Recharge in contravention of the
10 technical memorandum and Mr. Wildermuth’s report or (b) an *additional* quantity of
11 groundwater could be pumped in excess of inputs without incurring a replenishment obligation.
12 Both would undo the Court’s ruling as to the setting of Safe Yield at 135,000, and the latter
13 would cause an unauthorized overdraft. Consequently, Watermaster respectfully requests that
14 the Court’s final order be drafted to include this clarification as the response to the sole question
15 identified for further briefing.

16 Safe Yield must be recalculated in a manner “so that [Desalter-Induced Recharge] will be
17 available for Desalter Production rather than for use by individual parties to the Judgment.”
18 (Peace II Agreement at ¶ 7.1 (JCSD RJN at Ex. H).) Watermaster’s proposed construction
19 honors the Court’s analysis, does not require a Judgment amendment, and will not authorize
20 additional overdraft.

21 **B. Summary of Key Decisions**

22 The Court has indicated that, other than the question Watermaster addressed in section A.
23 above, no further briefing is required as to the balance of the Court’s Revised Proposed Order.
24 Based on its review of the Revised Proposed Order, following the Court’s finalization of the
25 order, Watermaster will undertake the following:

- 26 • From July 1, 2014 forward, amend its accounting to reflect the Safe Yield as 135,000
27 AFY, and give Land Use Conversion claims priority over Early Transfer claims. (Revised
28 Proposed Order at pp. 11, 16-19, 66-67.)₆

- 1 • Follow the process for the 2020 Safe Yield reset pursuant to the Agreement provisions
2 regarding the methodology and procedure for Safe Yield resets. (Revised Proposed Order
3 at pp. 17-18.)


4 If the Court disagrees with any element of the above, Watermaster requests that the Court provide
5 clarification and direction at the April 28, 2017 hearing and in any final order.

6 **C. Conclusion**

7 Watermaster knows the Court appreciates the significance of water as the lifeblood of the
8 region's economy. Consequently, Watermaster thanks the Court for its patience and
9 thoughtfulness in both providing a full and complete hearing and resolving this matter. With the
10 direction provided by this Order, Watermaster can continue its administration of the decree.

11
12 Dated: March 10, 2017

BROWNSTEIN HYATT FARBER
SCHRECK, LLP

13
14 By: 

15 SCOTT SLATER
16 BRADLEY J. HERREMA
17 CHINO BASIN WATERMASTER

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20
21
22
23
24
25
26
27
28

1 SCOTT S. SLATER (State Bar No. 117317)
BRADLEY J. HERREMA (State Bar No. 228976)
2 **BROWNSTEIN HYATT FARBER SCHRECK, LLP**
1020 State Street
3 Santa Barbara, CA 93101-2711
Telephone: 805.963.7000
4 Facsimile: 805.965.4333

5 Attorneys for
CHINO BASIN WATERMASTER

6
7
8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 FOR THE COUNTY OF SAN BERNARDINO

10
11 CHINO BASIN MUNICIPAL WATER
DISTRICT,

12 Plaintiff,

13 v.

14 CITY OF CHINO, et al.,

15 Defendants.
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Case No. RCV RS 51010

[Assigned for All Purposes to the
Honorable STANFORD E. REICHERT]

**DECLARATION OF MARK
WILDERMUTH IN SUPPORT OF
WATERMASTER RESPONSE TO THE
FEBRUARY 22, 2017 ORDER**

DATE: April 28, 2017

TIME: 1:30 P.M.

DEPT.: S35

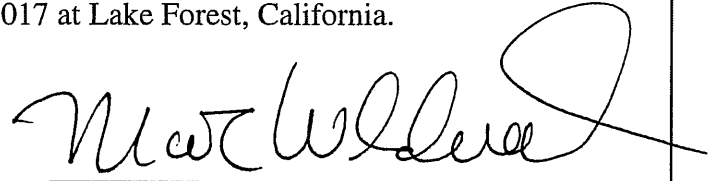
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Santa Ana River Underflow New Yield or SARUNY, is estimated to be the change in net Santa Ana River recharge to the Chino Basin since July 2000. SARUNY means the same thing as the term Desalter Induced Recharge that is used in the 2015 Safe Yield Reset Agreement. The net Santa Ana River recharge in the fiscal year spanning July 1999 through June 2000 is the baseline from which to measure SARUNY, which was estimated to be -2,153 acre-ft/yr, indicating that the Chino Basin discharged to the Santa Ana River 2,153 acre-ft/yr more water than was recharged by the River into the Basin.”

6. The DIR is calculated using the water budget terms *Streambed Infiltration in the Santa Ana River* (column 10 in Table 7-6) and *GW Discharge to Streams* (column 16 in Table 7-6), both of which are included in the annual net recharge and Safe Yield calculation. By definition, the DIR is the annual net Santa Ana River recharge above and beyond the net Santa Ana River recharge that occurred in 2000.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 9th day of March, 2017 at Lake Forest, California.



MARK WILDERMUTH

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CHINO BASIN WATERMASTER

Case No. RCV 51010

Chino Basin Municipal Water District v. The City of Chino

PROOF OF SERVICE

I declare that:

I am employed in the County of San Bernardino, California. I am over the age of 18 years and not a party to the within action. My business address is Chino Basin Watermaster, 9641 San Bernardino Road, Rancho Cucamonga, California 91730; telephone (909) 484-3888.

On March 10, 2017 I served the following:

1. CHINO BASIN WATERMASTER RESPONSE TO FEBRUARY 22, 2017 ORDER
2. DECLARATION OF MARK WILDERMUTH IN SUPPORT OF WATERMASTER RESPONSE TO THE FEBRUARY 22, 2017 ORDER

/X/ BY MAIL: in said cause, by placing a true copy thereof enclosed with postage thereon fully prepaid, for delivery by United States Postal Service mail at Rancho Cucamonga, California, addresses as follows:

See attached service list: Mailing List 1

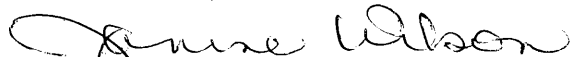
/ BY PERSONAL SERVICE: I caused such envelope to be delivered by hand to the addressee.

/ BY FACSIMILE: I transmitted said document by fax transmission from (909) 484-3890 to the fax number(s) indicated. The transmission was reported as complete on the transmission report, which was properly issued by the transmitting fax machine.

/X/ BY ELECTRONIC MAIL: I transmitted notice of availability of electronic documents by electronic transmission to the email address indicated. The transmission was reported as complete on the transmission report, which was properly issued by the transmitting electronic mail device.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on March 10, 2017 in Rancho Cucamonga, California.



By: Janine Wilson
Chino Basin Watermaster

BRIAN GEYE
AUTO CLUB SPEEDWAY
9300 CHERRY AVE
FONTANA, CA 92335

BOB KUHN
THREE VALLEYS MWD
669 HUNTERS TRAIL
GLEN DORA, CA 91740

ROBERT BOWCOCK
INTEGRATED RESOURCES MGMNT
405 N. INDIAN HILL BLVD
CLAREMONT, CA 91711-4724

STEVE ELIE
IEUA
17017 ESTORIL STREET
CHINO HILLS, CA 91709

GINO L. FILIPPI
CBWM BOARD MEMBER
305 N. 2ND AVE., PMB #101
UPLAND, CA 91786

PAUL HOFER
11248 S TURNER AVE
ONTARIO, CA 91761

DON GALLEANO
WMWD
4220 WINEVILLE ROAD
MIRA LOMA, CA 91752

BOB DiPRIMIO
CBWM BOARD MEMBER
11142 GARVEY AVENUE
EL MONTE, CA 91733

JAMES CURATALO
CUCAMONGA VALLEY WATER DIST
PO BOX 638
RANCHO CUCAMONGA, CA 91729

JEFF PIERSON
PO BOX 1440
LONG BEACH, CA 90801-1440

ALLEN HUBSCH
LOEB & LOEB LLP
10100 SANTA MONICA BLVD.
SUITE 2200
LOS ANGELES, CA 90067

BOB FEENSTRA
2720 SPRINGFIELD ST,
ORANGE, CA 92867

Members:

Allen W. Hubsch	ahubsch@loeb.com
Andrew Gagen	agagen@kidmanlaw.com
Arthur Kidman	akidman@kidmanlaw.com
Catharine Irvine	cirvine@DowneyBrand.com
Dan McKinney	dmckinney@douglascountylaw.com
David Aladjem	daladjem@downeybrand.com
Eddy Beltran	ebeltran@kidmanlaw.com
Fred Fudacz	ffudacz@nossaman.com
Jean Cihigoyenette	Jean@thejclawfirm.com
Jill Willis	jnwillis@bbklaw.com
Jim Markman	jmarkman@rwglaw.com
jimmy@city-attorney.com	jimmy@city-attorney.com
Joel Kuperberg	jkuperberg@rutan.com
John Harper	jrharper@harperburns.com
John Schatz	jschatz13@cox.net
Mark D. Hensley	mhensley@hensleylawgroup.com
Martin Cihigoyenette	marty@thejclawfirm.com
Michelle Staples	mstaples@jdtplaw.com
Nick Jacobs	njacobs@somachlaw.com
Paeter E. Garcia	paeter.garcia@bbklaw.com
Paige H. Gosney	pgosney@jdtplaw.com
Randy Visser	RVisser@sheppardmullin.com
Robert E. Donlan	red@eslawfirm.com
Rodney Baker	rodbaker03@yahoo.com
Steve Kennedy	skennedy@bmklawplc.com
Timothy Ryan	tjryan@sgwater.com
Tom Bunn	TomBunn@Lagerlof.com
Tom McPeters	THMcP@aol.com
Tracy J. Egoscue	tracy@egoscuelaw.com
Trish Geren	tgeren@sheppardmullin.com
William J Brunick	bbrunick@bmblawoffice.com

Members:

Agnes Cheng	agnes.cheng@cc.sbcounty.gov
Al Lopez	alopez@wmwd.com
Alfonso Ruiz Jr.	Alfonso.Ruiz@gerdau.com
Amanda Coker	acoker@cityofchino.org
Andrea Olivas	aolivas@jcsd.us
Andrew Silva	Andrew.Silva@cao.sbcounty.gov
Andy Campbell	acampbell@ieua.org
Andy Malone	amalone@weewater.com
Ankita Patel	apatel@niagarawater.com
Anna Truong	ATruong@cbwm.org
April Robitaille	arobitaille@bhfs.com
April Woodruff	awoodruff@ieua.org
Arnold "AJ" Gerber	agerber@parks.sbcounty.gov
Arnold Rodriguez	jarodriguez@sarwc.com
Art Bennett	citycouncil@chinohills.org
Ashok Dhingra	ash@akdconsulting.com
Ben Lewis	benjamin.lewis@gswater.com
Ben Peralta	bperalta@tvmwd.com
Bill Thompson	bthompson@ci.norco.ca.us
Bob Bowcock	bbowcock@irmwater.com
Bob DiPrimio	rjdiprimio@sgvwater.com
Bob Feenstra	bobfeenstra@gmail.com
Bob Kuhn	bgkuhn@aol.com
Bob Kuhn	bkuhn@tvmwd.com
Bob Page	bpage@cao.sbcounty.gov
Brad Herrema	bherrema@bhfs.com
Brandon Howard	brahoward@niagarawater.com
Brenda Fowler	balee@fontanawater.com
Brenda Trujillo	brendatrujillo@chinohills.org
Brent Yamasaki	byamasaki@mwdh2o.com
Brian Geye	bgeye@autoclubspeedway.com
Brian Hess	bhess@niagarawater.com
Brian Thomas	bkthomas@jcsd.us
Camille Gregory	cgregory@cbwm.org
Carol Bennett	cbennett@tkeengineering.com
Carol Boyd	Carol.Boyd@doj.ca.gov
Carolina Sanchez	csanchez@weewater.com
Casey Costa	ccosta@chinodesalter.org
Chad Blais	cblais@ci.norco.ca.us
Charles Field	cdfield@att.net
Charles Linder	Charles.Linder@nrgenergy.com
Charles Moorrees	cmoorrees@sawaterco.com
Chino Hills City Council	citycouncil@chinohills.org
Chris Berch	CBerch@ieua.org
Christopher R. Guillen	cguillen@bhfs.com
Chuck Hays	chays@fontana.org
Cindy Cisneros	cindyc@cvwdwater.com
Cindy LaCamera	clacamera@mwdh2o.com
Cindy Li	Cindy.li@waterboards.ca.gov
Craig Miller	CMiller@wmwd.com
Craig Stewart	Craig.Stewart@amec.com
Cris Fealy	cifealy@fontanawater.com
Curtis Paxton	cpaxton@chinodesalter.org
Curtis Stubbings	Curtis_Stubbings@praxair.com
Dan Arrighi	darrighi@sgvwater.com
Dan Chadwick	dchadwick@fontana.org
Danielle Soto	danielle_soto@CI.POMONA.CA.US
Darron Poulsen	darron_poulsen@ci.pomona.ca.us
Daryl Grigsby	daryl_grigsby@ci.pomona.ca.us
Dave Argo	daveargo46@icloud.com
Dave Crosley	DCrosley@cityofchino.org
David D DeJesus	tvmwddiv2rep@gmail.com

David De Jesus	ddejesus@tvmwd.com
David Huskey	David.Huskey@cdcr.ca.gov
David Lovell	dlovell@dpw.sbcounty.gov
David Penrice	dpenrice@acmwater.com
David Ringel	david.j.ringel@us.mwhglobal.com
David Starnes	david.starnes@mcmcn.net
Dennis Dooley	ddooley@angelica.com
Dennis Mejia	dmejia@ci.ontario.ca.us
Dennis Williams	dwilliams@geoscience-water.com
Diana Frederick	diana.frederick@cdcr.ca.gov
Don Galleano	donald@galleanowinery.com
Earl Elrod	earl.elrod@verizon.net
Edgar Tellez Foster	etellezfoster@cbwm.org
Eric Fordham	eric_fordham@geopentech.com
Eric Garner	eric.garner@bbklaw.com
Eric Leuze	Eric.Leuze@nrgenergy.com
Eric Tarango	edtarango@fontanawater.com
Erika Clement	Erika.clement@sce.com
Eunice Ulloa	eulloa@cbwcd.org
Felix Hamilton	felixhamilton.chino@yahoo.com
Frank Brommenschenkel	frank.brommen@verizon.net
Frank Yoo	FrankY@cbwm.org
Gabby Garcia	ggarcia@mvwd.org
Gailyn Watson	gwatson@airports.sbcounty.gov
Geoffrey Kamansky	gkamansky@niagarawater.com
Geoffrey Vanden Heuvel	geoffreyvh60@gmail.com
Gerald Yahr	yahrj@koll.com
Giannina Espinoza	gia.espinoza@gerdau.com
Gina Nicholls	gnicholls@nossaman.com
Gino L. Filippi	Ginoffvine@aol.com
Gloria Rivera	gloriar@cvwdwater.com
Grace Cabrera	grace_cabrera@ci.pomona.ca.us
Greg Woodside	gwoodside@ocwd.com
Henry DeHaan	hpdehaan@verizon.net
James Curatalo	jamesc@cvwdwater.com
James Jenkins	cnomgr@airports.sbcounty.gov
James McKenzie	jmckenzie@dpw.sbcounty.gov
Jane Anderson	janderson@jcsd.us
Janine Wilson	JWilson@cbwm.org
Jasmin A. Hall	jhall@ieua.org
Jason Marseilles	jmarseilles@ieua.org
Jason Pivovarov	jpivovarov@ieua.org
Jean Perry	JPerry@wmwd.com
Jeanina M. Romero	jromero@ci.ontario.ca.us
Jeannette Vagnozzi	jvagnozzi@ci.upland.ca.us
Jeffrey L. Pierson	jpierson@intexcorp.com
Jesse White	jesse.white@gerdau.com
Jessie Ruedas	Jessie@thejclawfirm.com
Jesus Placentia	jplasencia@cityofchino.org
Jill Willis	jnwillis@bbklaw.com
Jim Bowman	jbowman@ci.ontario.ca.us
Jim Taylor	jim_taylor@ci.pomona.ca.us
Jo Lynne Russo-Pereyra	jolynner@cvwdwater.com
Joanne Chan	jchan@wmwd.org
Joe Graziano	jgraz4077@aol.com
Joe Grindstaff	jgrindstaff@ieua.org
Joe Joswiak	JJoswiak@cbwm.org
Joe P LeClaire	leclairejp@cdmsmith.com
Joel Ignacio	jignacio@ieua.org
John Abusham	john.abusham@nrg.com
John Bosler	johnb@cvwdwater.com
John Huitsing	johnhuitsing@gmail.com
John Lopez and Nathan Cole	customerservice@sarwc.com
John V. Rossi	jrossi@wmwd.com

Jon Lambeck	jlambeck@mwdh2o.com
Jose Alire	jalire@cityofchino.org
Jose Galindo	jose_a_galindo@praxair.com
Josh Swift	jmswift@fontanawater.com
Julie Cavender	julie.cavender@cdcr.ca.gov
Julie Saba	jsaba@jcsd.us
Justin Brokaw	jbrokaw@marygoldmutualwater.com
Justin Nakano	JNakano@cbwm.org
Justin Scott Coe	jscottcoe@mvwd.org
Karen Johnson	kejwater@aol.com
Kathleen Brundage	kathleen.brundage@californiasteel.com
Kathy Kunysz	kkunysz@mwdh2o.com
Kathy Tiegs	Kathyt@cvwdwater.com
Kati Parker	kparker@ieua.org
Katie Gienger	kgienger@ontarioca.gov
Keith Person	keith.person@waterboards.ca.gov
Kelly Berry	KBerry@sawpa.org
Ken Jeske	kjeske1@gmail.com
Ken Waring	kwaring@jcsd.us
Kevin Blakeslee	kblakeslee@dpw.sbcounty.gov
Kevin Sage	Ksage@IRMwater.com
Krystn Bradbury	kbradbury@ontarioca.gov
Kurt Berchtold	kberchtold@waterboards.ca.gov
Kyle Snay	kylesnay@gswater.com
Landon Kern	lkern@cityofchino.org
Laura Mantilla	lmantilla@ieua.org
Lawrence Dimock	lawrence.dimock@cdcr.ca.gov
Lee Moore	Lee.Moore@nrgenergy.com
Linda Jadeski	ljadeski@wwwd.org
Linda Minky	LMinky@BHFS.com
Lisa Hamilton	lisa.hamilton@amecfw.com
Lisa Lemoine	LLemoine@wmwd.com
Lisa Snider	lsnider@ieua.org
Marco Tule	marco.tule@nrg.com
Maribel Sosa	Maribel_Sosa@ci.pomona.ca.us
Mark Wiley	mwiley@chinohills.org
Marsha Westropp	MWestropp@ocwd.com
Martin Zvirbulis	martinz@cvwdwater.com
Mathew C. Ballantyne	mballantyne@cityofchino.org
Matthew H. Litchfield	mlitchfield@wwwd.org
Michael Sigsbee	msigsbee@ci.ontario.ca.us
Mike Maestas	mikem@cvwdwater.com

Members:

Maria Flores	mflores@ieua.org
Maria Mendoza-Tellez	MMendoza@weewater.com
Marilyn Levin	marilyn.levin@doj.ca.gov
Mario Garcia	mgarcia@tvmwd.com
Mark Kinsey	mkinsey@mvwd.org
Mark Wildermuth	mwildermuth@weewater.com
Marla Doyle	marla_doyle@ci.pomona.ca.us
Martha Davis	mdavis@ieua.org
Martin Rauch	martin@rauchcc.com
Meg McWade	meg_mcwade@ci.pomona.ca.us
Melanie Otero	melanie_otero@ci.pomona.ca.us
Melissa L. Walker	mwalker@dpw.sbcounty.gov
Michael Adler	michael.adler@mcmcn.net
Michael Camacho	MCamacho@pacificaservices.com
Michael Cruikshank	MCruikshank@DBStephens.com
Michael P. Thornton	mthornton@tkeengineering.com
Michael T Fife	MFife@bhfs.com
Michael Thompson	michael.thompson@cdcr.ca.gov
Mike Sigsbee	msigsbee@ci.ontario.ca.us
Monica Heredia	mheredia@chinohills.org
Moore, Toby	TobyMoore@gswater.com
Nadeem Majaj	nmajaj@chinohills.org
Nadia Picon-Aguirre	naguirre@wvwd.org
Nathan deBoom	n8deboom@gmail.com
Neetu Gupta	ngupta@ieua.org
Nicole Escalante	NEscalante@ci.ontario.ca.us
Noah Golden-Krasner	Noah.goldenkrasner@doj.ca.gov
Pam Sharp	PSharp@chinohills.org
Pam Wilson	pwilson@bhfs.com
Patty Jett	pjett@spacecenterinc.com
Paul Deutsch	paul.deutsch@amec.com
Paul Hofer	farmwatchtoo@aol.com
Paul Hofer	farmerhofer@aol.com
Paul Leon	pleon@ci.ontario.ca.us
Paula Lantz	paula_lantz@ci.pomona.ca.us
Penny Alexander-Kelley	Palexander-kelley@cc.sbcounty.gov
Pete Hall	pete.hall@cdcr.ca.gov
Pete Hall	rpetehall@gmail.com
Pete Vicario	PVicario@cityofchino.org
Peter Hettinga	peterhettinga@yahoo.com
Peter Kavounas	PKavounas@cbwm.org
Peter Rogers	progers@chinohills.org
Peter Thyberg	Peter.Thyberg@cdcr.ca.gov
Rachel Avila	R.Avila@MPGLAW.com
Rachel Ortiz	rortiz@nossaman.com
Ramsey Haddad	ramsey.haddad@californiasteel.com
Randall McAlister	randall.mcalister@ge.com
Raul Garibay	raul_garibay@ci.pomona.ca.us
Ray Wilkings	rwilkings@autoclubspeedway.com
Rene Salas	Rene_Salas@ci.pomona.ca.us
Richard Zuniga	richard.zuniga@nov.com
Rick Darnell	Richard.Darnell@nrgenergy.com
Rick Hansen	rhansen@tvmwd.com
Rick Rees	Richard.Rees@amec.com
Rick Zapien	rzapien@cbwm.org
Rita Pro	rpro@cityofchino.org
Robert C. Hawkins	RHawkins@earthlink.net
Robert DeLoach	robertadeloach1@gmail.com
Robert Neufeld	robneu1@yahoo.com
Robert Stockton	bstockton@wmwd.com
Robert Tock	rtock@jcsd.us
Robert Wagner	rwagner@wbecorp.com

Rogelio Matta	rmatta@fontana.org
Roger Florio	roger.florio@ge.com
Roger Han	roger_han@praxair.com
Ron Craig	ronc@mbakerintl.com
Ron LaBrucherie, Jr.	ronLaBrucherie@gmail.com
Ronald C. Pietersma	rcpietersma@aol.com
Rosemary Hoerning	rhoerning@ci.upland.ca.us
Ryan Shaw	RShaw@wmwd.com
Sandra S. Rose	directorrose@mvwd.org
Sarah Schneider	sarah.schneider@amec.com
Scott Burton	sburton@ci.ontario.ca.us
Scott Runyan	srunyan@cc.sbcounty.gov
Scott Slater	sslater@bhfs.com
Seth J. Zielke	sjzielke@fontanawater.com
Shaun Stone	sstone@ieua.org
Sheri Rojo	smrojo@aol.com
Sonya Barber	sbarber@ci.upland.ca.us
Sonya Bloodworth	sbloodworth@wmwd.com
Sophie Akins	Sophie.Akins@cc.sbcounty.gov
Steve Riboli	steve.riboli@sanantoniowinery.com
Steve Smith	ssmith@ieua.org
Steven J. Elie	selie@ieua.org
Steven J. Elie	s.elie@mpglaw.com
Suki Chhokar	schhokar@sdcwa.org
Susan Collet	scollett@jcsd.us
Sylvie Lee	slee@ieua.org
Taya Victorino	tayav@cvwdwater.com
Teri Layton	tlayton@sawaterco.com
Terry Catlin	tlcatlin@wfajpa.org
Tim Barr	tbarr@wmwd.com
Todd Corbin	tcorbin@jcsd.us
Todd Minten	tminten@chinodesalter.org
Tom Cruikshank	tcruikshank@spacecenterinc.com
Tom Harder	tharder@thomashardercompany.com
Tom Haughey	tom@haugheyinsurance.com
Tom O'Neill	toneill@ci.ontario.ca.us
Toni Medel	mmedel@rbf.com
Van Jew	vjew@mvwd.org
Veva Weamer	vweamer@weewater.com
Vicki Hahn	vhahn@tvmwd.com
Vicky Rodriguez	vrodriagu@ci.ontario.ca.us
Vivian Castro	VCastro@cbwcd.org
W. C. "Bill" Kruger	citycouncil@chinohills.org
William Urena	wurena@angelica.com